

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TAMARA MOORE, et al.,  
Plaintiffs,  
v.  
MARS PETCARE US, INC., et al.,  
Defendants.

Case No. [16-cv-07001-MMC](#)

**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS; AFFORDING  
PLAINTIFFS LEAVE TO AMEND**

Re: Dkt. Nos. 92, 93, 95

Before the Court are the following three motions, each filed April 3, 2017: (1) "Motion to Dismiss Plaintiffs' Claims Under § 1 of the Sherman Act" ("Antitrust Motion"), brought collectively by defendants Mars Petcare US, Inc. ("Mars"), Royal Canin U.S.A., Inc. ("Royal Canin"), Nestle Purina Petcare Company ("Purina"), Hill's Pet Nutrition, Inc. ("Hills"), PetSmart, Inc. ("PetSmart"), Medical Management International, Inc. d/b/a Banfield Pet Hospital ("Banfield"), and Bluepearl Vet, LLC ("Bluepearl"); (2) "Motion to Dismiss Plaintiffs' State Law Claims" ("State Law Motion"), brought collectively by defendants Mars, Royal Canin, Purina, and Hills (hereinafter, "Manufacturer Defendants"); and (3) "Motion to Dismiss Plaintiffs' Sixth Cause of Action" ("MMPA Motion"),<sup>1</sup> brought by defendant Purina, to the extent such claim is asserted against said defendant. All three motions have been fully briefed.

The matter came on regularly for hearing on July 7, 2017. Michael A. Kelly and Matthew D. Davis of Walkup, Melodia, Kelly & Schoenberger; Daniel Shulman and Julia

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<sup>1</sup> Plaintiffs' Sixth Cause of Action is brought under the Missouri Merchandising Practices Act ("MMPA").

Dayton Klein of Gray, Plant, Mooty, Mooty, & Bennett, P.A.; Michael L. McGlamry, Wade H. Tomlinson III, and Caroline G. McGlamry of Pope McGlamry, P.C.; and Edward J. Coyne III of Ward and Smith, P.A. appeared on behalf of plaintiffs. John E. Schmidlein, Benjamin M. Greenblum, and Xiao Wang of Williams & Connolly LLP appeared on behalf of Mars, Royal Canin, Banfield, and Bluepearl. Christopher M. Curran and J. Frank Hogue of White & Case LLP appeared on behalf of Purina. Michael F. Tubach and Hannah Y. Chanoine of O'Melveny & Myers LLP appeared on behalf of Hills. Eileen R. Ridley of Foley & Lardner LLP appeared on behalf of PetSmart.

The Court, having considered the parties' respective written submissions and the arguments of counsel at the hearing, rules as follows.

**A. Antitrust Motion**

All defendants move to dismiss Count I of plaintiffs' First Amended Complaint ("FAC"), for failure to allege facts evidencing an agreement in violation of the Sherman Act, 15 U.S.C. § 1. For the reasons stated on the record at the hearing, the Court agrees.

Accordingly, the Antitrust Motion is hereby GRANTED, with leave to amend to allege facts sufficient to plead parallel conduct, see Bell Atlantic Corp. v. Twombly, 555 U.S. 544, 556-57 (2007), and "plus factors," see In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015).

**B. State Law Motion**

Manufacturing Defendants move to dismiss Counts II-XIII of the FAC, plaintiffs' state law claims, on the following grounds: (1) failure to plead fraud with sufficient particularity under Rule 9(b) of the Federal Rules of Civil Procedure; (2) failure to allege reliance and causation; (3) lack of standing to seek injunctive relief; (4) lack of standing to bring a claim based on products not purchased by plaintiffs; and (5) failure to plead entitlement to equitable relief.

For the reasons stated on the record at the hearing, the Court finds:

(1) Plaintiffs' state law claims, to the extent based on an alleged

misrepresentation, have not been pleaded with the particularity required by Rule 9(b), namely, identification of the false or misleading statement, by whom it was communicated, to whom it was communicated, and “what is false or misleading about [the] statement.” See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

(2) Plaintiffs have not alleged facts sufficient to plead reliance where required under the relevant state consumer protection law, nor have they alleged facts sufficient to plead proximate causation under any such law.

(3) Plaintiffs have failed to allege facts sufficient to plead Article III standing to bring a claim for injunctive relief, in particular, facts demonstrating plaintiffs’ intent to purchase the accused products in the future despite their allegation that such products are more expensive than products having the same composition.

(4) Plaintiffs have failed to allege facts sufficient to plead Article III standing to bring a claim for any product not alleged to have been purchased by a named plaintiff.

(5) Given that plaintiffs’ unjust enrichment claims are based on their allegations of misrepresentation, and given the insufficiency of those claims as pleaded, plaintiffs likewise fail to plead a claim for unjust enrichment. Further, as to their unjust enrichment claims under Florida and North Carolina law, plaintiffs fail to allege facts sufficient to show they directly conferred a benefit on any Manufacturer Defendant. See Am. Safety Ins. Serv., Inc. v. Griggs, 959 So. 2d 322, 331 (Fla. Dist. Ct. App. 2007); Effler v. Pyles, 380 S.E. 2d 149, 152 (N.C. Ct. App. 1989).

Accordingly, the State Law Motion is hereby GRANTED, with leave to amend to cure the deficiencies identified above.

### **C. MMPA Motion**

Purina moves to dismiss Count VI of the FAC for failure to plead Article III standing and failure to state a claim.<sup>2</sup> For the reasons stated on the record at the hearing, the

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<sup>2</sup> To the extent Purina also moves to dismiss on due process and choice-of-law grounds, the Court finds such issues are more appropriate for resolution after the

1 Court is not persuaded by the first argument, but is persuaded by the second.

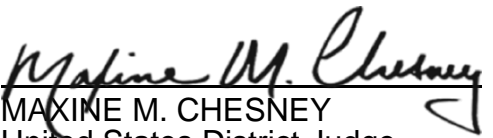
2 Accordingly, the MMPA Motion is hereby GRANTED, with leave to amend to  
3 allege facts demonstrating sufficient "ties between the allegedly fraudulent  
4 [Massachusetts] transactions and Missouri." See Perras v. H & R Block, 789 F.3d 914,  
5 918 (8th Cir. 2015).

6 **CONCLUSION**

7 Defendants' motions are hereby GRANTED, with leave to amend as set forth  
8 above. Plaintiffs' Second Amended Complaint shall be filed no later than July 31, 2017.

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10 **IT IS SO ORDERED.**

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12 Dated: July 10, 2017

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14 MAXINE M. CHESNEY  
15 United States District Judge  
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28 pleadings are settled as to the named plaintiff's claim.